

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Plaintiff,

v.

GIOVANNI G. VISENTIN,

Defendant.

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JAN 20 2011
C.D. OF N.Y.

11 Civ. _____

COMPLAINT

JUDGE SEIBEL

JURY TRIAL DEMANDED

'11 CIV 00399

International Business Machines Corporation (“IBM” or the “Company”),
by its attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, upon personal
knowledge with respect to itself and its actions and otherwise on information and belief,
alleges as follows:

Nature of the Action

1. IBM brings this action for damages and injunctive relief to prevent Giovanni G. Visentin, a long-time senior executive at IBM who left the company yesterday, from commencing employment at the Hewlett-Packard Company, Inc. (“HP”), one of IBM’s chief competitors, in violation of the noncompetition agreements Mr. Visentin signed with IBM on July 29, 2009 and July 16, 2008.

2. HP and IBM are fierce competitors in many aspects of the computer business, including the information technology services business. IBM and HP compete directly – often head-to-head to win clients – in selling and delivering computer consulting, management, productivity, and outsourcing services to multinational corporations, small businesses, governments, and educational institutions in the United States and around the world.

3. Having spent the last three years as a General Manager for North America of IBM's Information Technology Services business, Mr. Visentin plans to become the Senior Vice President, General Manager, Americas for HP's Enterprise Services business – precisely what he agreed with IBM in his non-competition agreements that he would not do. IBM and HP compete for the same client contracts and engagements to provide information technology services.

4. If Mr. Visentin were allowed to switch to the HP side of the competition – which his non-competition agreements strictly forbid – he would bring with him numerous IBM trade secrets including, *inter alia*, highly confidential and commercially sensitive information about the strategic plans and financial performance of the business he is leaving, competitive bidding strategies, internal price and cost models, new client opportunities and targets for 2011, perceived gaps in IBM's products and services, and the proprietary tools, processes and methods IBM uses to win client contracts in competition with its rivals like HP.

5. Mr. Visentin's intention to work and compete against IBM in the same line of business for HP creates a real and unavoidable risk that IBM's trade secrets and confidential business information will inevitably be used by Mr. Visentin and HP to the commercial and competitive detriment of IBM.

6. To protect IBM against that very harm, and prohibit Mr. Visentin from causing such damage to IBM, his noncompetition agreement requires that he wait one year before working for a competitor like HP. Nonetheless, in violation of that agreement, Mr. Visentin has told IBM that he will not honor his one-year waiting period

but will begin working as an executive in the leadership of HP's Enterprise Services business in competition with IBM immediately.

7. IBM will suffer irreparable injury if the trade secrets and confidential and proprietary information that Mr. Visentin possesses were disclosed to or used to benefit a competitor like HP, as it inevitably will be, if Mr. Visentin goes to work for HP prior to the expiration of his one-year non-compete period.

Parties

8. IBM is a corporation organized under the laws of the State of New York with its principal place of business located in Armonk, New York, within the Southern District of New York.

9. Giovanni G. Visentin is an individual who resides at 4 Sickle Bar Lane, Riverside, Connecticut, 06878.

Jurisdiction and Venue

10. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, because the matter in controversy exceeds the sum of \$75,000, exclusive of costs and interest, and there is complete diversity of citizenship between the parties.

11. The Court has personal jurisdiction over Mr. Visentin because, in Paragraph 15 of the noncompetition agreement he entered into with IBM on July 29, 2009 (the "2009 Noncompetition Agreement"), and Paragraph 13 of the noncompetition agreement he entered into with IBM on July 16, 2008 (the "2008 Noncompetition Agreement"), he consented to exclusive jurisdiction in the federal and state courts of the State of New York, County of Westchester, for the resolution of all disputes arising under, or relating to, the Noncompetition Agreements.

12. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391 because IBM's headquarters and principal place of business are situated within this judicial district and a substantial part of the events giving rise to the claims occurred in this judicial district. In addition, in Paragraph 15 of the 2009 Noncompetition Agreement, and Paragraph 13 of the 2008 Noncompetition Agreement, Mr. Visentin consented to exclusive venue in the federal and state courts of the State of New York, County of Westchester, for the resolution of all disputes arising under, or relating to, those Agreements.

Relevant Facts

IBM

13. IBM is one of the world's largest technology companies. With over 400,000 employees, IBM is a globally-integrated enterprise that offers information technology and business process services, including computer hardware and software, and other advanced information technologies to a wide range of business and consumer clients.

14. Like most technology companies and large global businesses, IBM relies upon trade secrets and other confidential information in developing and implementing its product offerings, technology services, business and sales strategies, acquisition and growth plans and strategies, and its competitive sales campaigns, and each year spends billions of dollars and dedicates extensive research efforts to the development of technological innovations supporting its hardware, software and services businesses.

15. Among other things, IBM utilizes trade secrets, proprietary information and methods, confidential technical know-how, competitively-sensitive

client and distribution information, and confidential competitive strategies to design, develop, manufacture, and bring to market a variety of products and services relating to computer systems, including information technology services.

16. IBM is organized into several principal business segments, one of which is the Global Technology Services business (or “GTS”) in which Mr. Visentin was a senior executive and worked as a General Manager for North America. GTS provides various information technology services to its clients, for example, by assisting them in optimizing and operating their computer infrastructure and systems.

17. Mr. Visentin was the General Manager for North America in IBM’s Integrated Technology Services business before resigning on January 19, 2011 and announcing his intention to become Senior Vice President and General Manager for HP’s Enterprise Services in the Americas.

18. IBM’s Integrated Technology Services business (“ITS”) is one of GTS’s largest and most profitable businesses. ITS provides technology services and solutions that enable customers to increase the efficiency, productivity and resilience of their information technology systems.

19. ITS offers a portfolio of approximately 180 different technology services, including designing cloud infrastructures, increasing efficiencies in IT systems, optimizing storage capabilities, providing disaster recovery and back up capabilities, and implementing data security systems.

Giovanni G. Visentin

20. Prior to his resignation, Mr. Visentin spent more than 20 years working at IBM. He began work in March 1986, and worked at IBM continuously until January 19, 2011.

21. Over his career at IBM, Mr. Visentin held several high-level positions. From 2004 to 2006 he was a Client Advocacy Executive, supporting IBM's President and Chief Executive Officer, Samuel Palmisano. Mr. Visentin had responsibility for arranging Mr. Palmisano's client engagements and assisted in the preparations for those client meetings by Mr. Palmisano. In 2006, Mr. Visentin became the Vice President for End-User Services in GTS.

22. In 2007, Mr. Visentin was promoted to General Manager of Integrated Technology Services in GTS. In that role, he had overall responsibility for the sale and delivery of all of ITS services. Mr. Visentin is thus intimately familiar with IBM's strategies and plans in that area, its methods of selling and delivering services, and its major customers and potential customers.

23. Mr. Visentin was also a member of the Senior Leadership Team in GTS. In that capacity, he attended quarterly meetings at which were discussed the strategies and plans for GTS generally, including Outsourcing and ITS.

24. In 2006, IBM created an elite Integration & Values Team ("I&VT"), a select group comprising roughly the top 300 senior managers who IBM believes are its key business leaders among its over 400,000 employees worldwide. Mr. Visentin was an I&VT member.

25. The I&VT is charged with addressing the most difficult and important issues facing IBM. I&VT members receive trade secret and other highly confidential information across IBM's entire business. Specifically, I&VT members regularly receive and review highly sensitive strategic and marketing plans and analysis

of long-term business opportunities, including development information about specific IBM products.

26. In addition, Mr. Visentin was a member of an I&VT task force involved in the development of one of IBM's most important company-wide strategic initiatives, Business Analytics.

27. In his capacity as a senior executive and member of the I&VT, Mr. Visentin has gained detailed knowledge of IBM's Global Technology Services' confidential strategies; business models, *i.e.* pricing and cost models; client targets and growth plans; service product offerings; proprietary tools and methods; global resource strategy and methods for implementing that strategy; and service delivery capabilities.

28. He also has first-hand knowledge of, among many other things, IBM's Global Technology Services' prospective client opportunities in 2011; financial budgets, forecasts and results; non-public revenues, expenses, labor costs, and profit projections; and product and service innovations being developed by IBM for the services business.

Mr. Visentin's 2009 Noncompetition Agreement with IBM

29. On July 29, 2009, Mr. Visentin executed the more recent of his two Noncompetition Agreements with IBM (the "2009 Noncompetition Agreement," a true and correct copy of which is attached hereto as Exhibit A).

30. In that agreement, Mr. Visentin acknowledged and agreed that "as a member of the I&VT, [he] will be exposed to some of the most sensitive and confidential information possessed by IBM," information that "represents the product of the Company's substantial global investment in research and innovation, is critical to the Company's competitive success, is disclosed to the Company's senior leaders only on a

strictly confidential basis, and is not made accessible to the public or to the Company's competitors." (2009 Noncompetition Agreement § 1(a).)

31. In the 2009 Agreement, Mr. Visentin acknowledged and agreed that:

during [his] employment with IBM and for twelve (12) months following the termination of [his] employment . . . , [he] will not directly or indirectly within the "Restricted Area" (i) "Engage in or Associate with" (a) any "Business Enterprise" or (b) any competitor of the Company (2009 Noncompetition Agreement § 1(d).)

32. The Noncompetition Agreement provides the following definitions for the defined terms in the foregoing provision:

(a) "Restricted Area" is defined as "any geographic area in the world for which [Mr. Visentin] had job responsibilities during the last twelve (12) months of [his] employment with IBM." (*Id.* § 2(e).)

(b) "Engage in or Associate with" is defined to mean, among other things, acting as an "associate, employee, member, consultant, contractor or otherwise." (*Id.* § 2(c).)

(c) "Business Enterprise" is defined as "any entity that engages in . . . competition with any business unit or division of the Company in which [Mr. Visentin] worked at any time during the three (3) year period prior to the termination of [his] employment." (*Id.* § 2(a).)

33. Thus, Mr. Visentin agreed in the Noncompetition Agreement that, for a period of one year following the termination of his employment from IBM he would not (1) work for any competitor of IBM, or (2) work for any company that engages in competition with any business unit or division of IBM in which he worked in the last three years.

34. Additionally, in the Noncompetition Agreement, Mr. Visentin made several important representations and acknowledgments. Among others, Mr. Visentin expressly acknowledged that:

(a) “the business in which [the Company is] engaged is intensely competitive” (*Id.* § 1(b).);

(b) his “employment by IBM has required, and will continue to require, that [he] have access to, and knowledge of, confidential information of the Company, including, but not limited to, certain or all of the Company’s methods, information, systems, plans for acquisition or disposition of products, expansion plans, financial status and plans, customer lists, client data, personnel information and trade secrets of the Company, all of which are of vital importance to the success of the Company’s business” (*Id.*);

(c) his “services to the Company are, and will continue to be, extraordinary, special and unique” (*Id.*);

(d) “the Company would suffer irreparable harm if [he failed] to comply with [the noncompetition and the nonsolicitation covenants]” (*Id.* § 3.); and

(e) “the restrictions set forth in [the covenants] are reasonable as to geography, duration and global scope.” (*Id.*)

35. In the Noncompetition Agreement, Mr. Visentin further agreed not to solicit IBM customers or employees, as follows:

during [his] employment with IBM and for twelve (12) months following the termination of [his] employment . . . [he] will not directly or indirectly within the “Restricted Area” . . . solicit, for competitive business purposes, any customer of the Company with which [he was] involved as part of [his] job responsibilities during the last twelve (12) months of [his] employment with IBM[;] [and]

for the two (2) year period following the termination of [his] employment . . . [he] will not directly or indirectly within the “Restricted Area,” hire, solicit or make an offer to any employee of the Company to be employed or perform services outside of the Company. (*Id.* § 1(d).)

36. In connection with his signing of the Non-Competition Agreement, Mr. Visentin received an additional award of IBM stock options and Restricted Stock Units under IBM’s Long-Term Performance Plan (“LTPP”). The Agreement provides, however, that if he breaches the Agreement, LTPP awards issued within the prior twelve months may be cancelled or rescinded. (*Id.* § 5.)

Mr. Visentin’s 2008 Noncompetition Agreement with IBM

37. On July 16, 2008, Mr. Visentin executed the first of his two Noncompetition Agreements with IBM (the “2008 Noncompetition Agreement,” a true and correct copy of which is attached hereto as Exhibit B).

38. In that agreement, Mr. Visentin agreed that during [his] employment with IBM and for one (1) year following the termination of [his] employment...[he] will not directly or indirectly within the “Restricted Area” (i) “Engage in or Associate with” (a) any “Business Enterprise” or (b) any significant competitor or major competitor of the Company.... (2008 Noncompetition Agreement § 1(b).)

39. In the 2008 Noncompetition Agreement, “Restricted Area” is defined as “any geographic area in the world for which [Mr. Visentin] had job responsibilities during the last twelve (12) months of [his] employment with the Company.” (*Id.* § 2(d).)

40. In the 2008 Noncompetition Agreement, “Engage in or Associate with” is defined to mean, among other things, acting as an “associate, employee, member, consultant, contractor or otherwise.” (*Id.* § 2(c).)

41. In the 2008 Noncompetition Agreement, “Business Enterprise” is defined as “any entity that engages in...competition with the business units or divisions of the Company in which you worked at any time during the two (2) year period prior to the termination of your employment.” (*Id.* § 2(a).)

42. Thus, Mr. Visentin agreed in the 2008 Noncompetition Agreement that for a period of one year following the termination of his employment from IBM he would not (1) work for any significant competitor or major competitor of IBM, or (2) work for any company that engages in competition with the business units or divisions of IBM in which he worked. Mr. Visentin’s employment at HP violates both provisions: HP is a significant and major competitor of IBM and HP competes with the business units and divisions at IBM in which Mr. Visentin worked in the two years prior to the termination of his employment.

43. Additionally, in the 2008 Noncompetition Agreement, Mr. Visentin made several important representations and acknowledgments. Among others, Mr. Visentin expressly acknowledged that

“the business in which IBM and its affiliates...are engaged is intensely competitive” (*Id.* § 1(a));

“[his] employment by IBM has required, and will continue to require, that [he] have access to, and knowledge of, confidential information of the Company, including, but not limited to, certain or all of the Company’s methods, information, systems, plans for acquisition or disposition of products, expansion plans, financial status and plans, customer lists, client data, personnel information and trade secrets of the Company, all of which are of vital importance to the success of the Company’s business” (*Id.*);

“[his] services to the Company are, and will continue to be, extraordinary, special and unique” (*Id.*);

“the Company would suffer irreparable harm if [he failed] to comply with [the noncompetition and the nonsolicitation covenants]” (*Id.* § 3); and

“the restrictions set forth in [the covenants] are reasonable as to geography, duration and scope” (*Id.*).

44. In the 2008 Noncompetition Agreement, Mr. Visentin agreed to the same nonsolicitation covenants as he did in the 2009 Noncompetition Agreement. (*Id.* § 1(b).)

**Mr. Visentin’s Employment by HP
Violates the Noncompetition Agreement**

45. Despite having signed the Noncompetition Agreements, Mr. Visentin told IBM on January 19, 2011, that he was resigning from IBM in order to join IBM’s competitor, HP, immediately, becoming the Senior Vice President, General Manager, of the Americas for HP’s Enterprise Services.

46. It is inevitable that Mr. Visentin will use the trade secrets and highly confidential and proprietary information he learned in his executive positions at IBM in his work for HP, particularly since the work he says he will be doing at HP – selling IT services - is so similar to the work he was doing at IBM, and since HP is increasing its efforts to compete with IBM.

47. By accepting a job at HP immediately after resigning from IBM, Mr. Visentin is doing exactly what he pledged not to do in his noncompetition agreements – go to work for a competitor, like HP, less than a year after leaving IBM.

48. The risk of disclosure and/or use of IBM’s trade secrets, key customer relationships, proprietary methods, strategic business plans and client development plans, and sensitive confidential business information to such a direct competitor, and the manifest and irreparable harm such disclosure could cause to the Company, is precisely the interest that IBM sought to safeguard and Mr. Visentin agreed to protect in executing the Noncompetition Agreement.

COUNT I — Breach of Noncompetition Agreement

49. IBM repeats and realleges, as if fully set forth herein, the allegations of Paragraphs 1 through 48 of the Complaint.

50. The Noncompetition Agreements are enforceable agreements that impose upon Mr. Visentin certain contractual obligations.

51. Mr. Visentin has breached the terms of his Noncompetition Agreements by, among other things, accepting employment with HP without waiting for expiration of the one year non-compete period to which he expressly agreed.

52. If Mr. Visentin is not enjoined from working for HP, and thereby violating his Noncompetition Agreements, IBM will be irreparably injured inasmuch as Mr. Visentin will inevitably make use of and/or disclose IBM trade secrets and other confidential and proprietary IBM information in performing his job at HP.

53. IBM will also be irreparably harmed if Mr. Visentin is not enjoined from violating the nonsolicitation covenants in the Noncompetition Agreements.

COUNT II — Misappropriation of Trade Secrets

54. IBM repeats and realleges, as if fully set forth herein, the allegations of Paragraphs 1 through 53 of the Complaint.

55. IBM possesses certain trade secrets and confidential information with which Mr. Visentin is familiar, and which Mr. Visentin has a common law duty not to disclose outside of IBM.

56. The Noncompetition Agreements are enforceable agreements that impose upon Mr. Visentin certain contractual obligations, including the obligations of nondisclosure with respect to IBM's confidential information.

57. Mr. Visentin, as long as he is employed by HP, will inevitably use and/or disclose IBM trade secrets for his own benefit and for the benefit of HP.

58. As an unavoidable result of Mr. Visentin's impending misappropriation of IBM trade secrets, IBM will be irreparably harmed.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment seeking relief against defendant as follows:

Imposing a preliminary and permanent injunction ordering Mr. Visentin to refrain from: (a) breaching the terms of his Noncompetition Agreements with IBM, and (b) commencing employment with HP, performing services for HP, or otherwise associating with HP in less than one-year's time, in violation of IBM's rights under the Noncompetition Agreements;

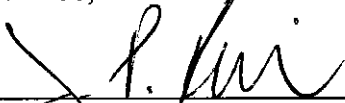
1. Awarding IBM its attorneys' fees, costs, and disbursements incurred as a result of this action;
2. Awarding IBM monetary damages in an amount sufficient to compensate the Company for Mr. Visentin's breaches of contract, together with rescission of any LTPP Awards Mr. Visentin has received from IBM within the last twelve months and of any other compensation or benefits that IBM is entitled to rescind; and
3. Awarding IBM such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues triable by a jury.

Dated: New York, New York
January 20, 2011

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By:  _____

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